In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2068

ANGELO BARTEMIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that (1) the prosecutor withheld exculpatory evidence; (2) the prosecutor made an improper closing argument; (3) the indictment was duplicitous; (4) he should not have been convicted for aiding and abetting the possession of stolen bonds, since the theft occurred before his involvement in the case; and (5) the court of appeals made clearly erroneous findings of fact in affirming his conviction.

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was found guilty of aiding and abetting in the possession of bonds stolen from an interstate shipment, knowing them to be stolen, in violation of 18 U.S.C. 659 and 2. He was sentenced to a term of five years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. A).

The evidence showed that petitioner was engaged in aiding and abetting co-defendants Brennan, Drain and Barbara Quattrochi[1] in the possession and disposal of one hundred and eighty-nine stolen Oklahoma City Housing Authority Bonds. Petitioner's involvement in the unlawful possession was shown by the fact that the first five digits of his license plate number were written on a brown paper bag containing stolen bonds found in the rear of Drain's car; that his name and telephone number were found on both Drain and Brennan when they were arrested; and that "he was observed driving Barbara Quattrochi, the actual seller of the bonds, to the south side of Chicago to meet her source, and engaging in diversionary tactics to prevent anyone from following her (Quattrochi) to the O'Hare Inn where the sale of the bonds was to occur" (Pet. App. A4).

1. Petitioner contends that the prosecutor, in violation of *Brady* v. *Maryland*, 373 U.S. 83, suppressed a fifteen page statement given by Barbara Quattrochi to the probation office, which formed part of her pre-sentence investigation report and which contained exculpatory material. Three pages of this statement were introduced at petitioner's trial as a handwriting exemplar (Govt. Ex. 13) to prove that Quattrochi had written certain notations on a piece of paper found on her person at the time of her arrest.[2] Petitioner concedes that these three pages were

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[1]Petitioner and his co-defendants were charged in a two-count indictment (Pet. App. A). Count One charged each of the defendants with conspiracy. Count Two charged Brennan, Drain and Quattrochi with possession of stolen securities and petitioner with aiding and abetting in that possession. Petitioner was acquitted on the conspiracy count; Brennan and Drain were convicted on both counts; Barbara Quattrochi entered a plea of guilty to both counts prior to trial.

[2]These notations (Govt. Ex. 8) indicated that petitioner was to receive a portion of the abortive sale of bonds. Barbara Quattrochi did not testify at petitioner's trial.

provided to defense counsel prior to trial, but contends that "the balance of this statement * * * was never tendered or showed to defense counsel" until after the court of appeals affirmed petitioner's conviction (Pet. 5). In his petition for rehearing filed with the court of appeals, petitioner alleged for the first time that the government had unlawfully withheld the Quattrochi statement.

The United States Attorney, in his response, denied that the balance of the Quattrochi statement, which was not turned over to the accused, contained evidence which was in any way favorable to him. Petitioner's contention that Quattrochi's statement contained exculpatory material is now pending before the district court, by motion of petitioner pursuant to 28 U.S.C. 2255. Since the district court is the proper forum for the resolution of this question, it would be inappropriate for this Court to consider this factual issue prior to a determination by that court.

2. Petitioner contends that the prosecutor's closing argument was prejudicial and that it denied him a fair trial. This contention is based on the use of the phrase "I think" several times by the prosecutor during the course of his closing argument. On several occasions petitioner's counsel objected to the use of the phrase and in each instance the trial court instructed the jury that "what the prosecutor says is not to be taken as his personal opinion" (Tr. 754, 755, 756, 758). The trial court also instructed that the prosecutor's function was limited to "arguing the legitimate inferences from the evidence" (Tr. 754, 755, 756), and that his use of the term "I think" was "his habit of speech," and not intended to be an expression of personal opinion (Tr. 754, 755, 756, 759). The prosecutor acknowledged the correctness of the court's instructions by repeatedly apologizing for his verbal slips (Tr. 755, 756, 758). In reviewing these incidents the court of appeals

correctly found "that the use of the above expression by the government attorney was not prejudicial to appellants when viewed in the context of the trial court's immediate curative instructions" (Pet. App. A 8).

Any error with regard to the prosecutor's comments was therefore harmless in these circumstances. *Chapman* v. California, 386 U.S. 18, 22-24; *Harrington* v. *California*, 395 U.S. 250. See also, *Donnelly* v. *DeChristoforo*, No. 72-1570, decided May 13, 1974.

3. Petitioner raises a series of contentions relating to the indictment (Pet. App. B) under which he was charged. He claims that it is duplicitous and multiplicitous. He also contends that his acquittal on the conspiracy count should void his conviction on the aiding and abetting count since the latter offense is allegedly incorporated by reference into the conspiracy count as "overt acts."

As the court of appeals noted (Pet. App. A 6), duplicity consists of joining in one count of an indictment two or more distinct and separate offenses. *United States* v. *Tanner*, 471 F. 2d 128, 138 (C.A. 7). The instant indictment against petitioner consisted, however, of two counts—a conspiracy count and an aiding and abetting count. The court stated, "[e]ach count required proof not common to the other." The indictment was therefore not duplicitous.

Multiplicity consists of charging the same defendant with the same offense in several different counts. *Gerberding* v. *United States*, 471 F. 2d 55, 58 (C.A. 8). Aiding and abetting the commission of a substantive offense, however, is a crime different from a conspiracy to commit the same substantive offense. Evidence establishing knowledge of another's criminal activity and an aiding of it does not itself establish conspiracy. *United States* v. *Krol*, 374 F. 2d 776, 778-779 (C.A. 7). It was not inconsistent,

therefore, that petitioner should have been acquitted on the conspiracy count yet convicted of the aiding and abetting count.

4. Petitioner contends that he could not be charged as an aider and abettor because the bonds were stolen prior to his involvement in the case. In support of his position petitioner relies upon this Court's decision in *Bollenbach* v. *United States*, 326 U.S. 607. *Bollenbach*, however, is inapposite. Bollenbach was charged with aiding and abetting the transportation of stolen securities in interstate commerce. The facts established that his only involvement was trying to find a buyer for the securities long after they had been transported. This Court, held, therefore, that while Bollenbach could have successfully been charged as an accessory after the fact, he could not be convicted of aiding and abetting the already accomplished transportation. 326 U.S. at 610-11. In contrast, petitioner here was charged with aiding and abetting in the *possession* of stolen goods and not the earlier theft of those goods. The evidence therefore fully supported his conviction.

5. Finally, petitioner contends that his conviction is infirm because the court of appeals assumed certain findings of fact which he argues are clearly erroneous. Petitioner contends that the paperbag on which the first five numbers of his license were written did not contain the bonds, as indicated by the court of appeals, but was rather found empty in his co-defendant's car. Evidence at trial disclosed, however, that the brown bag with petitioner's license number (Govt. Ex. 14) was identical to the bag (Govt. Ex. 15) in which the balance of the stolen bonds were found. He next claims that the notation on the bag indicated that he had a white Ford, when in truth his car is black and white. And, finally, he asserts that only Brennan was found in possession of his address and phone

number, rather than each of his co-defendants. Even assuming, *arguendo*, the accuracy of each of these assertions, the jury could still infer petitioner's participation as an aider and abettor in the possession of stolen bonds. See *Glasser* v. *United States*, 315 U.S. 60, 80.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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